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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91208003
Party	Plaintiff Red Bull GmbH
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Date	09/08/2014
Attachments	Michael Ball RED Applns-91208003-Answer to Counterclaim.pdf(19891 bytes)

**CERTIFICATE OF ELECTRONIC FILING AND
STANDBY AUTHORIZATION TO CHARGE DEPOSIT ACCOUNT**

I hereby certify that the Answer to Counterclaim is being filed with the TTAB via ESTTA on the date set forth below.
Date: September 8, 2014

/Leah Z. Halpert/
Leah Z. Halpert

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

<hr/> MICHAEL F. BALL, Applicant/Counterclaim Petitioner)	Consolidated Matter: 91-208,003 Opposition No. 91-208,003 (Parent) Opposition No. 91-214,448 (Child)
v.)	Marks:
RED BULL GMBH,)	+RED DETOX ELIXIR (#85/400,933)
)	+RED DREAM ELIXIR (#85/400,941)
)	+RED SUN REPAIR ELIXIR (#85/400,955)
)	+RED RESCUE ELIXIR (#85/406,652)
Opposer/Counterclaim Registrant)	+RED POWER ELIXIR (#85/400,948)
)	

**ANSWER TO COUNTERCLAIM/PETITION FOR CANCELLATION
OF U.S. REG. NO. 3,939,863¹**

Opposer/Counterclaim Registrant, RED BULL GMBH (“Red Bull”), of Am Brunnen 1, Fuschl am See, A-5330 Austria, by its counsel, responds as follows to the Counterclaim/Petitioner for Cancellation of U.S. Reg. No. 3,939,863 (“Counterclaim”) filed by Applicant/Counterclaim Petitioner, MICHAEL F. BALL (“Applicant”):

1. As Paragraph 24 of the Counterclaim refers to Applicant’s answers and affirmative defenses to Red Bull’s Notice of Opposition, no answer is required here. Further, paragraph 22 (referenced in paragraph 24 of the Counterclaim) has been stricken per the Board Order dated August 15, 2014.
2. In regard to Paragraph 25 of the Counterclaim, Red Bull admits that it is the owner of US Trademark Registration No. 3,939,863, for RED which was registered on the Principal Register on April 5, 2011 and covers “energy drinks and soft drinks” in Int’l Class 32 (the “Registration”). Red Bull lacks knowledge and information sufficient to

¹ This Answer to Counterclaim/Petition for Cancellation is only in reference to the Answer filed in the Parent opposition as no answer has been filed in the Child opposition as of yet.

form a belief as to the truth of the rest of the allegations of Paragraph 25 of the Counterclaim, and therefore denies the same, leaving Applicant to strict proof thereof.

3. Red Bull admits that Applicant is the record owner of Application Nos. 85/400,933, 85/400,941, and 85/400,955, filed August 18, 2011, and 85/406,652, filed August 24, 2011 for the goods “non-alcoholic beverages, namely, carbonated beverages” in Int’l Class 32. Red Bull further admits that it opposed these applications on the grounds of a likelihood of confusion, in part, with the Registration under Section 2(d) of the Trademark Act. The remainder of Paragraph 26 of the Counterclaim is irrelevant to and/or addresses applications not included in these proceedings and does not require an answer.
4. Red Bull denies the allegations of Paragraph 27 of the Counterclaim.
5. Red Bull denies the allegations of Paragraph 28 of the Counterclaim.
6. Red Bull denies the allegations of Paragraph 29 of the Counterclaim, because use has never ceased so “resumption” is not in issue.
7. Red Bull denies the allegations of Paragraph 30 of the Counterclaim.
8. Paragraphs 31-35 of the Counterclaim deal specifically with an application that is currently pending before the USPTO, and as such are wholly outside of the jurisdiction of the Board, are irrelevant to these proceedings, and do not require an answer.
9. Red Bull denies the allegations of Paragraph 36 of the Counterclaim.
10. Red Bull admits the allegations of Paragraph 37 of the Counterclaim.
11. Red Bull admits the allegations of Paragraph 38 of the Counterclaim.
12. Red Bull denies the allegations of Paragraph 39 of the Counterclaim.
13. Red Bull denies the allegations of Paragraph 40 of the Counterclaim. Further, in regard to the references to Applicant’s pending Application Nos. 85/351,186 and 85/346,334,

which are not at issue in this opposition or counterclaim, these are irrelevant and do not require an answer.

14. Red Bull denies the allegations of Paragraph 41 of the Counterclaim.
15. Paragraph 42 of the Counterclaim merely references an administrative matter within this proceeding and does not require an answer.

AFFIRMATIVE DEFENSES

First Affirmative Defense - Laches

16. Applicant's claims are barred, in whole or in part, by the doctrine of laches. Specifically, on information and belief, Applicant has unreasonably delayed in asserting any claimed rights against Red Bull causing material prejudice due to that delay. On information and belief, Applicant was aware of the Registration and had standing to petition to cancel the Registration when it was first cited against Applicant's other applications (#85/351,186 and #85/346,334) on April 23, 2012. Further, Applicant had constructive notice of the Registration since April 5, 2011. On information and belief, rather than file a cancellation action once constructive notice occurred, Applicant delayed 2.5 years (1.5 years since the presumed actual notice occurred) until filing the instant counterclaim in order to petition to cancel the registration. This delay has caused Red Bull material prejudice.

Second Affirmative Defense - Acquiescence

17. Applicant's claims are barred, in whole or in part, by the doctrine of acquiescence. Specifically, on information and belief, Applicant's actions as set forth in Paragraph 16, above, establish its acknowledgement and assent to Red Bull's Registration No. 3,939,863. On information and belief, Applicant's actions as described in Paragraph 16 above, include Applicant's implied consent for nearly 2.5 years to Red Bull's use of its

Registration No. 3,939,863, which furthered Red Bull's activities in connection with the Registration.

Third Affirmative Defense – Equitable Estoppel

18. Applicant's claims are barred, in whole or in part, by the doctrine of equitable estoppel. Equitable estoppel "is not limited to a particular factual situation nor subject to resolution by simple or hard and fast rules." *A.C. Aukerman v. R.L. Chaides Construction Co.*, 960 F.2d 1020 (Fed. Cir. 1992). Nevertheless, Red Bull has relied upon Applicant's misleading conduct, including its 2.5 year delay in bringing this cancellation action and, thereby Red Bull has been materially prejudiced.

WHEREFORE, Red Bull requests that the Board dismiss this Counterclaim/Petition for Cancellation and enter Judgment in favor of Red Bull against Applicant, and any other relief as the Board deems just and proper.

Respectfully submitted,

RED BULL GMBH
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Dated: September 8, 2014

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **ANSWER TO COUNTERCLAIM/PETITION FOR CANCELLATION** is being served on September 8, 2014, by deposit of same in the United States Mail, first class postage prepaid, in an envelope addressed to Applicant's Attorney of Record, with a courtesy copy via email to CCook@oliff.com, TrademarkGroup@oliff.com.

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/Leah Z. Halpert/
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